POWER OF A STATE TO REVOKE THE RIGHT OF A FOREIGN CORPORATION TO DO INTRASTATE BUSINESS.—An interesting constitutional question is presented in considering the validity of a state law, which provides in substance, that if a foreign corporation licensed to do an intrastate business by the state, removes a suit commenced against it in a state court to a federal court or institutes a suit against a citizen of the state in a federal court, the license of the corporation shall be revoked. A statute so framed causes two independent rights to clash. The Constitution of the United States and legislation in pursuance thereof, gives a right to invoke the federal courts on the ground of the diverse citizenship of the parties to the litigation. Under the doctrine of reserved powers the states may exclude foreign corporations from doing intrastate business within their borders. There is no doubt about the former right. It is self-evident that if a state in so many words attempted to prevent foreign corporations from availing themselves of the federal courts, the statute so declaring would be unconstitutional. But if the latter right exists, is a statute, which merely sets it forth and proclaims that it will be exercised under certain circumstances, unconstitutional? In order to answer this question, we must examine the cases in which the right has been recognized, to ascertain its extent.

The cases divide themselves into two classes. In one an intrastate business alone was being done. In the other this business was being carried on in conjunction with interstate commerce. We will first consider the former. Paul v. Virginia [1] is the historic case on the subject. It was an insurance case and insurance has been consistently held not to be interstate commerce.[2] Virginia had imposed a license tax on foreign corporations for the privilege of doing business in the state. A company attempted to do business without paying the tax. The court held, that a foreign corporation may be excluded entirely or regulated as, in the judgment of the state, will best promote the public interest. In the Pembina Mining Co. v. Penna.[3] it was said, a foreign corporation not carrying on foreign or interstate commerce or not employed by the government of the United States, is dependent on the will of the state for any recognition. The state can grant it recognition on the payment of a license tax if it so desires. The clause of the Constitution granting all the privileges and immunities of citizens in the several states has no application to foreign corporations. The Fourteenth Amendment, to the effect that no state shall deprive any person of the equal protection of the laws, applies to corporations, but a foreign corporation is not a corporation outside of the state, of its creation until recognized. In other words, a licensed foreign corporation can claim the equal protection of the laws afforded to

[1] 8 Wall. 168 (1868).
[2] N. Y. Life Ins. Co. v. Cravens, 178 U. S. 389 (1900).
[3] 125 U. S. 181 (1887).

domestic corporations, but an unlicensed one cannot. Mr. Justice Field for the court said in the Horn Silver Mining Co. v. New York,[4] a state may impose as a condition of doing business as a corporation, the payment of a specific sum each year and may prescribe the mode in which the sum shall be ascertained. There is no constitutional inhibition against the legislature adopting any mode to arrive at the sum which it will exact as a condition of the creation of the corporation or of its continued existence. Nor can there be any greater objection to a similar tax upon a foreign corporation doing business within the state by its permission. A foreign corporation can claim a right to do business to any extent in another state only subject to the conditions imposed by its laws. The only exceptions are, where it does an interstate business or where it is in the employ of the United States. This was affirmed in the later case of New York v. Roberts.[5] The same doctrine appears in Hooper v. California.[6]

The next class comprises the cases in which the corporations were engaged in both forms of business. Obviously this complicates the situation. It is almost axiomatic, to state that interstate commerce is under the control of the Federal government. It has been held in numerous cases however, that the intrastate business may be separated from the interstate and as to the former, foreign corporations are subject to state control. In the Wells, Fargo Co. v. Northern Pacific Ry. Co.,[7] the court said, "Of course the right to engage in interstate commerce is not a right to do a local business within the territory and therefore the plaintiff has no rights to do business in Washington, Idaho, Montana and Dakota." Crutcher v. Kentucky[8] expresses the same thought. In pronouncing a tax invalid as being upon interstate commerce, it is said, "But taxes on license fees in good faith imposed exclusively on express business carried on wholly within the state would be open to no such objection." In Postal Telegraph Cable Co. v. Charleston,[9] the decision bears immediately. The company was a New York corporation doing both kinds of business in the State of South Carolina. The City of Charleston was a municipal corporation of the same state. By an act of the state legislature, the city was authorized to impose a license tax on persons engaged in business in the city. Accordingly a tax was imposed on the company for engaging in intrastate business in the city. The tax was sustained, although the company was also transacting an interstate business. It was only by the grace of the state, that they were permitted to do that sort of business and they must accept the conditions prescribed

[4] 143 U. S. 305 (1892).
[5] 171 U. S. 658 (1898).
[6] 155 U. S. 648 (1895).
[7] 23 Fed. 469 (1884).
[8] 141 U. S. 47 (1891).
[9] 153 U. S. 692 (1894).

or cease doing it. In the Waters-Pierce Oil Co. v. Texas,[10] the license of the oil company, a Missouri corporation, was taken away for a violation of the laws of Texas and they were prohibited from doing intrastate business thereafter. It is expressly stated, that business of a Federal nature is excluded from the operation of this judgment. The next recognition of the principle is in Pullman Co. v. Adams.[11] The State of Mississippi taxed the intrastate business of the Pullman Company. The latter objected. All the cars in use in Mississippi were interstate cars and local business was done by them at a loss, and consequently to tax them for engaging in it would burden interstate commerce. The court decided, since they were free to abandon this business, they must pay the state tax, if they desired to continue it. This case was affirmed in Allen v. Pullman Company.[12] Probably the strongest case decided up to this time is Kehrer v. Stewart.[13] The State of Georgia imposed a license tax upon all agents of packing houses doing business in the state. The defendant was an agent for a company which engaged in both forms of business and objected to the tax as burdening interstate commerce. The court held, that since the tax was for the privilege of engaging in intrastate business, it must be paid by anyone doing that kind of business and it mattered not, that by far the greater part of the business was interstate. The only exception was in the case of a man not regularly doing an intrastate business but compelled to once in awhile, when an interstate contract of purchase was broken and the goods had to be sold in the state.

From these cases it would appear, that the power of a state to control corporations engaged in intrastate business is absolute under all conditions. Therefore it would seem that a statute which merely states that a power acknowledged to be in the states will be exercised in the event of a foreign corporation going into the Federal courts on the ground of diverse citizenship, is constitutional. And so it was held in the Security Mutual Life Insurance Company v. Prewitt.[14] It had been decided, if the statute compelled an agreement in advance to waive the right of involving the Federal courts it was unconstitutional.[15] Mr. Justice Hunt put it on the ground, that a person could not contract away his constitutional rights. But when the same justice had the statute that we are considering, before him, he immediately said, no agreement is required here and this is valid.[16] In the Prewitt case the company was engaged solely in local business. Since the right of exclusion

[10] 177 U. S. 28 (1900).
[11] 189 U. S. 420 (1903).
[12] 191 U. S. 171 (1903).
[13] 197 U. S. 60 (1905).
[14] 202 U. S. 246 (1905).
[15] Ins. Co. v. Morse, 20 Wall. 445 (1874).
[16] Doyle v. Continental Ins. Co., 94 U. S. 535 (1876).

as to intrastate business apparently exists, although the company is also engaged in interstate commerce, we would expect to find, that the statute as applied to the local business of interstate railroad companies had been held constitutional. But the case of Herndon v. Chicago, Rock Island and Pacific Ry. Co.[17] is decided to the contrary. The decision is based on four cases decided at the same term of court.[18]

We will review these decisions. In the Western Union Telegraph Co. v. Kansas the state had imposed a license fee based on the entire capital stock whether used in or out of Kansas for the privilege of doing intrastate business. On refusal to pay, ouster proceedings were commenced. The court in the course of its opinion says, that the general rule, that a state may exclude foreign corporations or impose such terms and conditions on their doing business in the state as in its judgment may be consistent with the interests of the people, applies only to corporations engaged solely in intrastate business. Where the company is also engaged in interstate commerce, the exclusion may not be accomplished by burdening interstate commerce and since the tax imposed in the present case would directly burden that commerce, it is illegal and the corporation cannot be excluded for refusal to pay it. To get around the cases reviewed by us in which the corporations were excluded from doing a local business, although engaged in interstate commerce as well, it is said, that in none of these cases was a direct burden imposed on interstate commerce. The reasons of public policy for the decision may be best summed up in the words of the court: "We cannot fail to recognize the intimate connection which at this day exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce shall not be trammelled or burdened by local regulations which under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general right of the states to regulate their strictly domestic affairs is fundamental in our constitutional system and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the general government, and not in hostility to rights secured by the Supreme Law of the Land."

In view of the previous decisions of the Supreme Court, there seem to be very excellent grounds for the dissent delivered by Mr.

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[17] U. S. Supreme Ct. Advance Sheets, July 1, 1910, at page 633.

[18] W. U. T. Co. v. Kansas, 216 U. S. 1 (1910); Pullman Co. v. Kansas, 216 U. S. 56 (1910); Ludwig v. W. U. T. Co., 216 U. S. 146 (1910); Southern Ry. v. Greene, 216 U. S. 400 (1910).

Justice Holmes and acquiesced in by the late Chief Justice Fuller and Mr. Justice McKenna.

The Pullman Co. v. Kansas and Ludwig v. Western Union Telegraph Co. are in accord with the Western Union Telegraph Co. v. Kansas. The Southern Railway v. Greene is decided on different grounds. On the authority of Pembina Mining Co. v. Penna., *supra*, corporations are within the terms of the "equal protection of the laws" clause of the Constitution. A licensed foreign corporation is to be regarded as a corporation and if the statute does not embrace domestic corporations, it does not give equal protection. This argument is expressly used in the Herndon case, but is made as an additional reason for invalidating the statute rather than as the principal reason.

The inevitable conclusion to be drawn from these cases seems to us to be, that the Supreme Court has considerably restricted the long line of cases hitherto decided.

E. S. McK.

CONSTRUCTIVE TRUSTS—SUFFICIENCY OF EVIDENCE.—Where a purchaser at sheriff's sale has promised orally to hold the land in trust for the judgment debtor, and after he has taken title has denied the trust and claims the beneficial interest in the land for himself—under what circumstances should a court of equity compel him as a constructive trustee to reconvey?

Among other things, it is universally held that if the transaction is attended by circumstances which show legal fraud on the part of the purchaser, a constructive trust will arise.[1] Legal fraud may be defined as any intentional misstatement of a material fact by which another is induced to change his position to his detriment.[2] The condition of the purchaser's mind at the time he gets title by an absolute conveyance, is held in most jurisdictions to be a material fact. Thus, if the judgment debtor has been induced to permit the purchaser to acquire title at the sale for an inadequate consideration by reason of the purchaser's oral promise to hold in trust for him when the purchaser had no intention at the time of performing the promise, a clear case of legal fraud is made out. But suppose the purchaser made the promise in good faith but later repudiated it, what are the consequences? It is evident that there is no legal fraud in this case because the purchaser truly stated his intention, which was the inducement to lead the judgment debtor into the transaction, and the bare fact of inadequacy of consideration really proves nothing as to the *bona fides* of the transaction. It is also evident that the detriment which the latter has sustained is the same in both cases.

The prevailing American doctrine is to deny relief in the

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[1] Brison v. Brison, 75 Cal. 525 (1888).

[2] See discussion in Peek v. Derry, L. R. 14 App. Cas. 541.